

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D15/88

Salaries tax – receipt of income – salary due to employee withheld by way of set-off in order to discharge employee's obligation to employer – whether salary assessable – s 9(1)(a) of the Inland Revenue Ordinance.

Salaries tax – receipt of income – salary refunded to employer to discharge employee's obligation to employer – whether salary assessable – s 9(1)(a) of the Inland Revenue Ordinance.

Salaries tax – deductions – payment in lieu of notice – whether incurred in the production of assessable profits – s 12(1)(a) of the Inland Revenue Ordinance.

Panel: Denis Chang QC (chairman), Chen Yuan-chu and P A Hall.

Date of hearing: 27 April 1988.

Date of decision: 10 June 1988.

The taxpayer resigned her employment. She paid one month's salary to her employer in lieu of notice by returning her final month's salary to her employer. She made such payment because she wished immediately to commence a new employment. The IRD assessed her to salaries tax with respect to her final month's salary. She appealed.

Held:

- (a) The taxpayer was not entitled to a deduction for the payment which she made in lieu of notice, because such payment was not made 'in the production of' her income from her new employment.
- (b) The taxpayer had received the final month's salary and was therefore assessable with respect to it, even though she subsequently returned it.
- (c) The same result would apply even if she had not received the final month's salary but had simply set off the payment in lieu of notice against her final month's salary.

Appeal dismissed.

Case referred to:

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CIR v Sin Chun-wah HCt, Inl Rev App No 4 of 1987

Jennifer Chan for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

The Taxpayer was employed by the Hong Kong Government. She resigned with effect from 3 July 1984, paying a sum equivalent to one month's salary in lieu of notice, and immediately began working for another employer. She claimed that the salary thus 'refunded' to the Government was not chargeable to salaries tax either because the sum was a deductible expense against the salaries she earned from her new employer or on the ground that she should be treated as if she had never received this one month's salary.

The argument on deductible expense turns on section 12(1)(a) of the Inland Revenue Ordinance. To be deductible the expense must have been 'wholly and exclusively and necessarily incurred' in the production of the assessable income. The Taxpayer's argument was that it was so incurred because she would otherwise not have been able to begin working immediately for her new employer and thus to earn her salary from her new employer. In CIR v Sin Chun-wah (Inl Rev App No 4 of 1987), Mr Justice Nazareth recently (13 May 1988) rejected a similar argument. He held that the expense was not deductible. We are bound by the decision and hold that the sum refunded was not a deductible expense.

We would add that in our view it matters not whether the amount paid in lieu of notice was actually paid by way of a physical 'refund' after the salary was physically received by the Taxpayer or whether, with the consent of the Taxpayer and in accordance with the contract, there was a 'set-off' and the Taxpayer physically received one month's salary less than what he or she would have physically received had there been proper notice given to the employer. This particular point was left open by the learned judge in the Sin Chun-wah case. We do not, however, see why the mechanics of the payment in lieu of notice should make any difference. The 'set-off' would implicitly involve receipt of the month's salary which should therefore be chargeable to tax.

The appeal is therefore dismissed and the assessment confirmed.